In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1535

JOHN FRANZESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of bank robbery in violation of 18 U.S.C. 2113 and of conspiracy to commit that offense. He was sentenced to a total of fifty years imprisonment, pursuant to 18 U.S.C. 4208(a)(2), and fined a total of $20,000. The conviction was affirmed on appeal, 392 F. 2d 954 (C.A. 2). On petition for a writ of certiorari this Court vacated the judgment of the court of appeals, and remanded to the district court to determine the impact of electronic surveillance in the case. *Giordano* v. *United States,* 394 U.S. 310. The

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district court on remand found no taint from electronic surveillance.

Petitioner subsequently moved under Rule 33, F.R. Cr. P., for a new trial based on the discovery during another unrelated proceeding of the existence of a memorandum made by a former United States Attorney for the Eastern District of New York in which he had recorded his recollections of a preindictment interview with four government witnesses who testified at petitioner's trial.

The memorandum, which was written three days after the interview, reads in part (Pet. App., p. 14):

> Cordero and Zaher would be able to testify as to direct contracts [contacts] with Franzese in the planning of the bank robberies as well as the distribution of the monies. Parks and Smith would in a way be able to corroborate the testimony of the other two through conversations had with two other persons, who also would be defendan , immediately after a meeting in which Franzese discussed proposed robberies with Cordero and Zaher in a motel in Queens County.

Petitioner's argument is that, although the memorandum states that "Parks and Smith would in a way be able to corroborate the testimony of the other two through conversations had with two other persons," at trial their testimony was more extensive in that Parks and Smith each testified about some direct contact with petitioner (Pet. App. p. 14). In petitioner's view, the memorandum should, therefore, have been disclosed as favorable and material evidence for the defense.

However, as pointed out in the opinion of the district court, on the basis of which the court of appeals affirmed, this memorandum is not materially inconsistent with the testimony given at trial (Pet. 17–18). The testimony showed as follows: On the night of July 22, 1965, petitioner and his co-defendants held a "reorganization" meeting at the Aqueduct Motor Inn. Smith and Parks were at the bar and then went to a second floor room where they met with petitioner and the rest of the leadership (Tr. 73–79, 2372).[1] They were told that petitioner was taking over direction of the gang from Polisi, with whom they had expressed dissatisfaction (Tr. 81–85, 2372–2374). They then returned to the bar, and Cordero and Zaher went upstairs (Tr. 1782–1783). The discussions at this second meeting (Tr. 1456–1461, 1783–1787) and at subsequent meetings with petitioner attended by Cordero were more detailed, and included plans for bank robberies and the distribution of proceeds in the future (Tr. 1793–1799, 1807, 1820–1823, 1862–1864, 1872–1875, 1881–1884, 1900–1903, 1912–1916, 1936–1937). After they returned to the bar, Parks and Smith were assured by Polisi (convicted in another proceeding as a member of the same gang) and co-defendant Florio that "everything is all right" and "Potere is with us and knows quite a bit about this stuff and things should go very well." (Tr. 2375–2377). Since

[1] "Tr." refers to the transcript of petitioner's original trial, which consists of 21 volumes containing a total of over 4,000 pages. Although we have not filed the transcript with the Clerk, it is, of course, available should the Court wish to inspect it.

the contact with petitioner that Parks and Smith testified about at trial did not involve planning the subsequent bank robberies (except as to petitioner's takeover) there is no material inconsistency between the testimony at trial and this memorandum.

Moreover, the memorandum is not a detailed report of the interviews and indicates substantial selection as a result of the United States Attorney's interpretation and impressions.[2] In light of the great amount of impeaching material that was made available to petitioner, this memorandum is of no significance. It could not have raised a doubt in the minds of the jury about petitioner's guilt since it is not material to the issue whether the banks were robbed under petitioner's direction. In *United States* v. *Polisi*, 416 F. 2d 573 (C.A. 2), the court of appeals emphasized that to constitute a violation of one's constitutional right to favorable evidence necessary to the preparation of his defense, the evidence "suppressed" must be shown to be material and of some substantial use to the defendant (*id.* at 578). That test has not been met here. There was neither a violation of the principles of

[2] In his affidavit in support of the motion for a new trial, petitioner quotes the United States Attorney's testimony at the hearing where the memorandum was "discovered." He there said of the interview in question: "I did not inquire into any facts or circumstances concerning what testimony any of them could give. I did get the impression from talking to each of them that they had only given, at the most, a very sketchy outline of the facts surrounding Mr. Franzese and the other persons involved, up to that time."

Brady v. *Maryland*, 373 U.S. 83, nor any other basis for a new trial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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